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No. 89-220

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

JAMES E. SECRIST,

Petitioner,

v.

UNITED STATES SENATOR TOM HARKIN, PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CORRECTED COPY

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS DECISION UPHOLDING SUMMARY JUDGMENT BASED UPON INSUFFICIENT EVIDENCE OF ACTUAL MALICE CONFLICTS WITH THIS COURT'S DECISION IN *HARTE-HANKS COMMUNICATIONS, INC.* V. *CONNAUGHTON* WHERE RESPONDENTS ENGAGED IN A DELIBERATE EFFORT TO AVOID THE TRUTH IN THE CONTEXT OF A POLITICAL CAMPAIGN BY FAILING TO INTERVIEW OBVIOUS AND ACCESSIBLE WITNESSES AND BY FAILING TO INVESTIGATE READILY AVAILABLE SOURCES.

II. WHETHER THE COURT OF APPEALS ERRED IN RULING THAT THE ACCUSATION THAT PETITIONER ENGAGED IN ILLEGAL CAMPAIGN FUND-RAISING ON BEHALF OF AN INCUMBENT U.S. SENATOR WAS CONSTITUTIONALLY PROTECTED OPINION.

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*Pursuant to Supreme Court Rules 21.1 (b) and 28.1, the following were parties to the proceedings below:
James Secrist
Tom Harkin
Pam McKinney
John Frew
Citizens for Harkin (an unincorporated association)

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Respondents

Petition for Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit

OPINIONS BELOW

The following are reproduced in their entirety in the appendices:

Appendix A—The Ruling and Summary Judgment of the United States District Court for the Southern District of Iowa, dated August 2, 1988.

Appendix B—The Opinion of the United States Court of Appeals for the Eighth Circuit, dated May 9, 1989, in *Secrist* v. *Harkin*, 874 F2d 1244 (8th Cir. 1989).

JURISDICTIONAL STATEMENT

This libel case was brought by the petitioner in the United States District Court for the Southern District of Iowa. Upon conclusion of discovery in the case respondents moved for summary judgment. Said motion was argued on July 28, 1988, and granted on August 2, 1988.

Petitioner appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court in an opinion dated May 9, 1989, in *Secrist* v. *Harkin*, 874 F.2d 1244 (8th Cir. 1989).

Jurisdiction over this matter is conferred upon this Court by 28 U.S.C. 1254 (1) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. AMEND. 1: "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

U.S. CONST. AMEND. XIV, § 1: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, James Secrist, was an active duty Marine Corps officer for 21 years (1964-1985), serving two tours in Vietnam, first as an infantry platoon commander and later as a Marine pilot. During this service he was awarded the Bronze Star, 2 Purple Hearts, the Combat Action Ribbon, several Air Medals and other campaign medals and ribbons. After he returned to the United States, he attended law school at the College of William and Mary and was admitted to the Virginia bar. After serving as the Chief Defense Counsel and later as the Chief Prosecutor at the Marine Corps Base at Quantico, Va., he was ordered to the Navy Office of Legislative Affairs and, later, to the Department of Defense Legislative Affairs Office. At the time of the publication of the alleged defamatory campaign press release at issue in this case, petitioner was on assignment to the office of Senator Roger Jepsen at the direction of the Secretary of the Navy.

Lt. Col. Secrist performed his assigned duties just as any of the other military members who have been, and are being, assigned to congressional offices, but he did not wear his Marine Corps uniform at any time while assigned to the Senator's office. He was assigned to assist firms that wanted to do business with the federal government, to visit military installations to talk with members of the military on behalf of the Senator, to investigate waste, fraud, and abuse in federal procurement matters, and to otherwise assist the senator in his duties as a member of the Senate Armed Services Committee. Lt. Col. Secrist was not authorized to, nor did he engage in political campaign fundraising on behalf of Senator Jepsen.

Respondents in the case are all well educated, proficient, and experienced political campaign operatives. Collectively, they have advanced degrees in law, political science, journalism, public administration, mass communications, and law enforcement. Respondent Harkin has served five terms in the U.S. House of Representatives (1975-1985). At the time of the campaign press release at issue in the case, Respondent Harkin was a candidate for the U.S. Senate, Respondent Frew was Harkin's campaign manager and Respondent McKinney was Harkin's campaign press secretary. The offending press release, which was published approximately three weeks before the election, contained the following language in paragraphs 1, 6, 12, and 13:

> "A pentagon Marine Colonel assigned to drum up defense contracts for Iowa businesses has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.
>
> "Since its formation, the Jepsen '84 Committee has received more than $88,000 from defense contractors' contributions, including Lockheed, Boeing, TRW and LTV; about 60 percent of that amount was received after Secrist joined the Jepsen staff.

> "According to Harkin, Lt. Col. Secrist's involvement is clear. In the May 17-June 30, 1984 Federal Election Commission Report, Secrist's name appeared twice for reimbursement of more than $1,000 for travel expenses during that period. The reimbursements were made from Jepsen's office account. That office account has also come under fire this year for failure to report funds to the Federal Election Commission and the Internal Revenue Service.
>
> "'While the Lt. Col. may not be opening the Senator's car doors', Harkin said, 'It appears that he is successful at opening doors to defense campaign money coffers on behalf of the Senator.'" (Appendix B at 19b-20b).

All of the respondents testified in depositions that they performed or caused to be *conducted absolutely no investigation of the allegations contained in the press release.* Neither did they check to see if anyone else had conducted any investigation into the allegation that Secrist had been illegally raising money. In fact respondents in sworn testimony have indicated that *they did not care about what impact the press release would have on Secrist.* (Rec.[1] at 751-2, 786, 476-7, 760-1, 779-780, 525-6). Also, the Record below makes it abundantly clear that the fundraising accusation was false and that Secrist had not raised or attempted to raise political campaign funds.

Upon appellate review of the case the Court of Appeals affirmed the District Court's decision to grant Respondent's motion for summary judgment because the Court found

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[1] The Record (hereinafter "Rec.") below in *Secrist* v. *Harkin*, 874 F.2d 1244 (8th Cir. 1989), consists of five bound volumes. Volumes I-III are captioned "SEPARATE APPENDIX OF PLAINTIFF/APPELLANT", and Volumes IV-V are captioned "APPELLEES' SUPPLEMENTAL APPENDIX." All pages of the Record ("Rec.") follow *seratim* throughout all five volumes.

insufficient evidence of actual malice and because it found that the alleged defamatory statements in the press release, were constitutionally protected statements of opinion and not statements of fact. (*Secrist* v. *Harkin*, 874 F.2d 1244 (8th Cir. 1989); *see also* Appendix B).

ARGUMENT

I. THE COURT OF APPEALS DECISION UPHOLDING SUMMARY JUDGMENT BASED UPON INSUFFICIENT EVIDENCE OF ACTUAL MALICE CONFLICTS WITH THIS COURT'S RECENT DECISION IN *HARTE-HANKS COMMUNICATIONS, INC.* V. *CONNAUGHTON.* IN BOTH CASES, THE LIBEL DEFENDANTS ENGAGED IN A DELIBERATE EFFORT TO AVOID THE TRUTH IN THE CONTEXT OF A POLITICAL CAMPAIGN BY FAILING TO INTERVIEW OBVIOUS AND ACCESSIBLE WITNESSES AND BY FAILING TO INVESTIGATE READILY AVAILABLE SOURCES.

In this case petitioner must show that respondents published the offending press release with "actual malice," that is with reckless disregard for the truth, or with knowledge of falsity. *New York Times Co.* v. *Sullivan, 376 U.S. 254 (1964).* To demonstrate "reckless disregard" there must be "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," *St. Amant* v. *Thompson, 390 U.S. 727, 731 (1968),* or the publisher must have made the false publication with a "high degree of awareness of . . . probable falsity," *Garrison* v. *Louisiana, 379 U.S. 64, 74 (1964).*

However, the analysis and findings of the Court of Appeals below in this case, using the above tests, are greatly at odds with this Court's analysis and findings in its recent case, *Harte-Hanks Communications, Inc.* v. *Connaughton,* 491 U.S. ___, 105 L.Ed.2d 562, 109 S.Ct. 2678 (1989), where the

facts are remarkably similar to the facts in this case. Respondent Daniel Connaughton, the plaintiff below, was a political candidate running for a judgeship position in Ohio. About one month before the election a member of the incumbent judge's administrative staff (New) was arrested for bribery and a grand jury was convened. The local newspaper, published by petitioner which supported respondent's opponent, the incumbent judge, ran a front-page story one week before the election quoting a grand jury witness (Thompson) as stating that Connaughton had improperly tried to influence the grand jury through Thompson. Connaughton sued the newspaper for libel. About one and one-half months before the election Connaughton had gathered several persons at his home and taped an interview, primarily, of Thompson's sister (Stephens). During this taped interview Stephens made several allegations about the bribery of New, the member of the incumbent judge's administrative staff who had been arrested. Late in October agents of petitioner arranged a taped interview of Thompson during which she made several charges against respondent relative to the conduct of the interview of Stephens. Some of her answers were equivocal, improbable and otherwise seemingly not altogether reliable. Petitioner's agents investigated further and interviewed all of the other witnesses to the conversation with Thompson with the exception of Stephens.

After discussing the standards cited above, this Court found that this *failure to investigate* in *Connaughton* was so egregious that it amounted to "the purposeful avoidance of the truth". Based upon the record in *Connaughton*, this Court expanded the principle set forth in *St. Amant*, 390 U.S., at 731.

> . . . Accepting the jury's determination that petitioner's explanations for these omissions (*i.e.*, lack of thorough investigation) were not credible, *it is likely that the newspaper's inaction was a product*

> *of a deliberate decision (or deliberate indifference) not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges.* Although failure to investigate will not alone support a finding of actual malice . . . the *purposeful avoidance of the truth* is in a different category . . . .

Connaughton, 491 U.S., at ____, 105 L.Ed., at 591, 109 S.Ct., at 2698. (Parenthesis and emphasis added.)

The record below dramatically demonstrates that respondents in this case utterly failed to conduct *any* investigation in "a deliberate effort to avoid the truth."

As in *Connaughton*, respondents in this case were involved in a hotly contested political campaign. Respondents here, as in *Connaughton*, failed even to attempt to contact any of a number of readily available and accessible sources. A partial list of these sources would include: Secrist himself; Senator Jepsen; any member of Jepsen's campaign staff (20-30 persons); any member of Jepsen's senatorial staff (50-60 persons); any of the Iowa firms Secrist had been in contact with (300-400); any member of the federal government or Iowa government that Secrist had been in contact with (20-30 individuals); and, any of the 31 firms that Harkin personally and specifically requested be listed in the press release to imply that Secrist had illegally solicited campaign funds from them.

Furthermore, the Record below shows that none of the respondents caused any investigation to be conducted by governmental authorities. Inasmuch as respondents charged petitioner with serious, criminal misconduct there were several investigatory avenues available to them. They could have notified, among others: the Secretary of Defense, the Secretary of the Navy, the Commandant of the Marine Corps, the Federal Election Commission, the Naval Investigative Service, the Federal Bureau of Investigation or the U.S. Attorney's Office. Clearly, respondents chose this course of

deliberate inaction because, as in *Connaughton*, they were motivated by personal political gain and did not want to know the truth because it would not have served their selfish, political purposes. This fact alone should be sufficient evidence to support a jury finding that respondents knew their publication was false or had serious doubts about its truthfulness.

The Court of Appeals below examined evidence which went to the issue of whether or not respondents published with actual malice beginning on page 14 of its opinion. (Appendix B at 14b). However, the Court of Appeals failed in its opinion to examine the evidence presented by petitioner to support a finding of actual malice, but rather discusses only the evidence which tended to support respondents' position. On page 15 of its opinion the Court of Appeals states: " . . . A review of the evidence presented in this case convinces us that Secrist has not met his burden . . . ." (*Id.* at 15b). The Court then lists and discusses four items of evidence offered by respondents. But these four items are merely the items parroted by the respondents in their affidavits (Rec. at 60-63) and nothing in any of these four items evidences that Secrist was raising money for political purposes.

The first item of evidence is a conversation overheard by a Harkin campaign worker (Teresa O'Brien) between Secrist and a member of Jepsen's staff. An examination of O'Brien's testimony (Rec. at 1641-53) discloses that whatever she heard (she is not sure what she heard or who said it), she certainly did not hear anything about Secrist raising money for Jepsen. About this incident Mr. Waters, Harkin's chief of staff, testified. Mr. Waters said that he had been told that O'Brien had overheard a conversation between Secrist and a member of Jepsen's staff that she knew (Rec. at 1641-42). But there was *no attempt to contact* this Jepsen staff member to determine if Secrist was involved in any illegal fundraising. As in *Connaughton*, though the Harkin staff knew there were

sources there that could help them with a determination of the truth, they made no attempt to contact them.

The second item of evidence is the fact that Jepsen's campaign committee had reimbursed Secrist for travel to Iowa on two occasions. But political campaign funds may be spent for any official purpose and need not be related to the campaign. This was a proper payment and respondents knew it was proper (McKinney's testimony; Rec. at 737). In any event nothing about the reimbursement would lead one reasonably to conclude that Secrist was raising political funds.

Item number three is even more remote—that Department of Defense expenditures in Iowa had decreased since Secrist joined Jepsen's staff. The reasons why Department of Defense expenditures in any State might be decreasing are many, but this statement in the Harkin press release was designed and offered as evidence that Secrist wasn't performing his assigned duties, but rather was illegally soliciting political contributions from defense contractors for Harkin's opponent.

The fourth item of evidence is similarly without factual foundation when used to indicate that Secrist was raising funds. There had been an increase in contributions from defense contractors to Jepsen since Secrist's appointment. However, there was no evidence whatever linking petitioner's activities to that increase in contributions. Moreover, Respondent Harkin was well aware that the phenomenon of campaign contributions increasing later in a political campaign was standard and in fact had occurred to him in his campaigns (Rec. at 605-6).

The factual evidence offered by Secrist to support a finding of actual malice by respondents, but not discussed by the Court of Appeals, is overwhelmingly clear and convincing. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 246 (1986). Those facts include:

1—The clear language of the press release itself accusing petitioner of illegal fundraising. (*See* Appendix B at 19b-20b).

2—McKinney's testimony that she believed the press release conveyed the idea that Secrist was securing contributions for Harkin's opponent; that she knew if the statement were true it would be a violation of the "Hatch Act" and would be a felony. (Rec. at 704-5).

3—McKinney's testimony that Harkin did suggest in the press release that Secrist had been successful in opening doors to defense campaign money and that he had been raising money for Harkin's opponent. (Rec. at 739-40).

4—McKinney's testimony that she knew it was proper for petitioner to be reimbursed for travel from campaign funds. (Rec. at 737).

5—McKinney's testimony that she conducted *no investigation* prior to the publication of the press release. (Rec. at 683-4).

6—McKinney's testimony that she knew Secrist had been traveling in Iowa; that she did not try to find out what he had been doing in Iowa though she knew that information would have been helpful to Iowans reading the release; that she realized she could easily have investigated the matter by simply calling Mr. Secrist; and, that from the time she talked to Harkin about the press release she *had done nothing* to determine the accuracy of the press release. (Rec. at 734-37, 751-52).

7—Frew's testimony that he made *no investigation* into what Secrist was doing, nor did he direct any of his staff people to investigate, though he stated he was very concerned about the accuracy of the press release; and, that he ensured a list of defense contractors from whom Secrist supposedly obtained contributions for Senator Jepsen be included in the press release out of a sense of completeness. (Rec. at 769a, 770, 778a, 778b, 786, 787).

8—McKinney's testimony that the press release, when published, was intended to be received as news and as factual. (Rec. at 677-78).

9—Harkin's testimony that he did not direct his staff to investigate a potential violation of the "Hatch Act" by Secrist; that he did not complain about this potential violation to the U.S. Attorney's Office or to the Federal Election Commission; and, that he believes the press release speaks for itself and that it points out in a very factual manner what had transpired with Secrist's job performance. (Rec. at 434, 468, 469).

10—A comparison of:

(a) McKinney's affidavit statement that she believed that the press release was true before it was published and she believes it is true now (Rec. at 61); and,

(b) Her sworn testimony that she has not thought about whether Jim Secrist was involved in raising funds for Harkin's opponent. (Rec. at 760).

11—The facts that the press release was issued about three weeks before the election, that the race was very close and that, therefore, just as in *Connaughton* (*see*, 491 U.S., at ____, 105 L.Ed.2d, at 574-77, 109 S.Ct., at 2683-86, for a discussion of evidence of motive supporting a finding of actual malice) respondents were motivated by personal, political gain to intentionally avoid the truth. (Rec. at 28, 707).

12—The testimony of Harkin that he knew of no person, business or corporation that had been solicited by Secrist for campaign contributions (Rec. at 393) and the testimony of McKinney that Harkin specifically asked her to include the list of 31 defense contractors from whom Secrist accusedly had solicited $51,000 (60% of $88,000). (Rec. at 667).

13—A comparison of the clear meaning of the press release (Rec. at 28) and McKinney's testimony attempting to

relate that the meaning of the press release is embodied in respondents' "goodwill fundraising theory" (*i.e.*, that the press release doesn't mean that Secrist was raising money, but rather that Secrist's mere presence increased contributions to Harkin's opponent). (Rec. at 770-71).

15—The fact that none of the respondents requested any governmental agency to investigate their allegation that Secrist had been illegally raising campaign money, which investigation would have quickly verified *or disproved* respondents' allegation with absolutely no effort on the part of respondents or any of their staff members. (Rec. at 434, 751-52, 769-70).

15—A disinterested UPI reporter's interpretation and subsequent publication that the press release contained a "charge" by Harkin that Secrist had been raising campaign funds. (Rec. at 32) (*See also*, discussion, pages 18-19 of this petition).

II. THE COURT OF APPEALS ERRED IN RULING THAT THE ACCUSATION THAT PETITIONER ENGAGED IN ILLEGAL CAMPAIGN FUNDRAISING ON BEHALF OF AN INCUMBENT U.S. SENATOR WAS CONSTITUTIONALLY PROTECTED OPINION BECAUSE BOTH THE DEPOSITION TESTIMONY AND THE PLAIN LANGUAGE OF THE PRESS RELEASE ESTABLISH THAT THE FUNDRAISING CHARGE WAS A STATEMENT OF FACT.

A. The Deposition testimony in this case clearly demonstrates that the charge that Secrist was raising campaign funds was stated as fact and not opinion and was intended to be received as fact and not opinion.

From McKinney's deposition:

"Q. You were trying to get anyway statewide publication of this press release?

A. As we did with all of our press releases.

Q. And when you mailed it, you knew that this would probably have statewide release; didn't you?

A. Yes, sir.

Q. And that was the intent in mailing it?

A. Yes, sir.

Q. And that would have been the intent of the two superiors that approved it, Frew and Harkin?

A. I don't know what their intents were, sir.

Q. They were aware of the process of the press release; weren't they?

A. Yes, sir.

Q. Now, you mentioned one of the purposes would be to require Senator Jepsen to respond?

A. Yes, sir.

Q. Explain that for me, would you?

A. Well, when a press release is sent out from a political campaign, the usual procedure by a member of the new media is to contact both sides. Often the campaign that puts out the press release is not contacted, but the opposing campaign is. And then they make a response or choose not to make a response.

Q. *You're sending these out as news; is that correct?*

A. *Yes, sir.*

Q. *Do I understand they are intended to be news and factual?*

A. *Yes, sir.*" (Rec. at 677-78) (Emphasis added).

From Mr. Frew's deposition:

"Q. Do you recall making any comments about the drafts? (of the press release).

A. Yes, I do.

Q. And what were your comments?

A. I asked that the accuracy of the figures as well as the source of the figures be checked, again, to be double-checked, and second, I suggested some wording changes from the draft to be included in the final draft.

Q. First, with regard to the wording change, do you recall what subject matter or what portion of the release you were concerned about?

A. I can't recall.

Q. With regard to the figures, what figures were you concerned about?

A. Well, at any time there are figures in any type of a document, particularly those going to the press—I think if you look on page 3, I can't say these were the exact figures, but at any time figures are presented to me, I ask that—does the page add up; are the numbers, for example, Bendix PAC $250, what is the source of that; is that an accurate rendition from the source. *Just to be double-checked for accuracy. Merely being careful.*" (Rec. at 769a, 770) (Parenthesis and emphasis added).

"Q. What was the purpose of including the list of defense contractors in the press release?

A. The list of defense contractors was included out of a *sense of completeness*. In the press release it is referred—it is indicated that the Senator's re-election campaign had received a certain amount of money from political action committees representing defense contractors in this country, and as we

> oftentimes and always try to, out of a sense of completeness, indicate just exactly what those figures—where these figures came from. And if a figure is included in a press release and alluded to, then we felt it was important that we beg the question, and answer it, for the press at the same time we gave them this information, this release, otherwise it would be incomplete." (Rec. at 786b, 787) (Emphasis added).

From Harkin's deposition:

> "Mr. Avery: I'm asking Senator Harkin this question. Would you agree with me that Harkin exhibit 1 (the press release) suggests that Mr. Secrist has been involved in political fund-raising?
>
> The Witness: My answer to that is I believe that the press release speaks for itself and that it points out in a very, I think *factual manner* what basically had transpired with regards to his job performance and the information evidently staff received from the Department of Defense Office of Information on what had happened to Senator Jepsen's campaign contributions." (Rec. at 434) (Parenthesis and emphasis added).

Additionally, the day after the press release was published Respondent Frew had opportunity to comment to news reporters on the press release and whether or not it was published as opinion. "The other thing is that over $88,000 has come in, $51,000 of that since Secrist has been on board. If you're asking me, 'Is it documented?' No. It's not documented, *but it's fact*," Frew said. (Rec. at 32) (Emphasis added).

B. An examination of the facts under the test provided in *Ollman* v. *Evans*, 242 U.S. App. D.C. 301, 750 F.2d 970 (1984), *cert. denied*, 471 U.S. 1127-30 (1985), also shows that

the offending press release in this case was published as fact and not as opinion.

> To evaluate the totality of the circumstances of an allegedly defamatory statement we will consider four factors in assessing whether the average reader would view the statement as fact or, conversely, opinion.

242 U.S. App. D.C., at 310, 750 F.2d, at 979.

The court went on to describe the four-part test: (1) An analysis of the common usage or meaning of the specific language of the challenged statement itself to determine whether the statement is indefinite and ambiguous, or definite and unambiguous; (2) A consideration of the statement's verifiability, *i.e.*, is the statement capable of being objectively characterized as true or false; (3) a consideration of the full context of the allegedly defamatory statement to see if the surrounding language would influence the average reader's readiness to infer that a particular statement has factual content; and, (4) A consideration of the broader context or setting in which the statement appears since different types of writing have widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion. (*Id.*).

Application of the *Ollman* test to the press release language in the instant case follows:

(1) The clear meaning of the press release is that petitioner was not performing the duties he was assigned to do, but rather that he was busy raising money for Senator Jepsen's reelection bid. Specifically, that he was wholly or largely responsible for 60 percent of $88,000 received from defense contractors (who were all listed in the press release; Rec. at 28-31), that his involvement in the fund raising was clear and that he was successful at opening doors to defense campaign money coffers on behalf of Senator Jepsen. This language is definite and unambiguous. Its purpose is crystal clear; it was

designed to charge improper and illegal conduct on the part of petitioner approximately three weeks before the election date.

(2) The statements made are fully verifiable—did petitioner raise money for Senator Jepsen or didn't he? The respondents even provided the names of at least some of the defense contractors from whom petitioner supposedly obtained money. With a minimum of effort anyone could easily prove or disprove the allegation. Speculation is not involved here, but rather the simple weighing of objective facts. With a simple investigation by Harkin's staff, or by any of the several governmental agencies available to them, respondents could easily have verified or disproved their charge.

(3) In examining the context in which the statement occurs a close look at the surrounding language in the press release is necessary to see if that language would influence an average reader that the allegedly defamatory matter is presented as fact and not opinion. The surrounding language in the press release contains: (1) facts about Secrist's assignment to the Senator's office; (2) facts about the amount of defense dollars that had come into Iowa during different time periods; (3) facts about which defense companies had contributed to Senator Jepsen's campaign and in what amount; (4) facts about Senator Jepsen's duties as a member of the Senate Armed Services Committee; (5) facts about the Defense Department regulation concerning the assignment of military members outside the Department of Defense; (6) facts about a letter written to Navy Secretary Lehman from Senator Jepsen; and (7) facts about petitioner being reimbursed from travel expenses from the Jepsen office account. There is no surrounding language in the press release which could be classified as opinion, nor which would indicate that the primary defamatory matter cited above is other than fact.

This absence of opinion, or language that would indicate that the press release was not factual, was entirely intentional

on the part of the respondents. By including in the press release a number of facts, even though they were out of context, distorted and misleading, the respondents hoped to make the reader believe that petitioner was involved in illegal, fundraising activities.

(4) The last part of the *Ollman* test is to examine the broader social context in which the allegedly defamatory statement was made. The *Ollman* court stated, " . . . Some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact . . . ." (242 U.S. App. D.C., at 314, 750 F.2d, at 983). The statements in this case were made in a political campaign *news release.* Indeed, the word NEWS is found at the top of the first page of the publication (Rec. at 28). Readers believe, in fact rely on, that what is published to them as news is correct, accurate, well researched, and factual. As Respondent McKinney said, in the case of this news release it was intended to be news and intended to be factual. (Rec. at 678).

In this campaign news release published about three weeks before the election was to take place, *respondents stood to gain more if the release were seen as fact and not as opinion. They were motivated by personal gain to have the release received as factual news.* That was their intent and that was what they accomplished.

It is unmistakably clear, from an examination of the press release using the *Ollman* test and from the sworn testimony of the respondents themselves, that the press release was published as fact and not opinion.

Additionally, the petitioner is fortunate in this case to have the timely, disinterested interpretation by one who was present the day the press release was published. Mr. Eric Woolson, a UPI reporter, did a story from the press release on the afternoon it was published. Mr. Woolson wrote, "Harkin leveled the *charge* Thursday that Col. James Secrist, who was

assigned to help Iowa businesses cope with the Pentagon's procurement process, has been more successful at raising money for Jepsen's reelection bid." (Rec. at 32) (Emphasis added). As may clearly be seen from this objective interpretation, the press release contained a "charge", an accusation that petitioner was engaged in illegal fundraising activity and the "charge" was not an opinion—it was not intended to be seen as opinion and it was not received as opinion.

In the case of *King* v. *Globe*, 400 Mass. 705, 512 N.E. 2d 241 (1987), *cert. denied*, ___ U.S. ___, 99 L.Ed.2d 581, 108 S.Ct. 1121 & ___ U.S. ___, 99 L.Ed.2d 427, 108 S.Ct. 1227 (1988), the Supreme Judicial Court of Massachusetts found that a statement alleged to be defamatory in similar circumstances was not published as opinion. The facts which the court used to support this finding were far less than we have in this case:

> We agree with the plaintiff as did the motion judge, that the statement that the plaintiff 'called a judge and demanded that he change a decision he had rendered in a gang-rape case' was unambiguously a statement of fact. This was a statement that a specific, verifiable event had occurred. There was neither imprecision in meaning nor anything in the context of the article that suggested the statement was not factual. Indeed, the statement, in context, functions as factual support for the author's critical characterization of the plaintiff's attitude toward other State officials. These are factors that we have previously recognized as tending to establish a statement as one of fact rather than of opinion for First Amendment purposes. Thus, the defendants are not entitled to summary judgment on the ground that the allegedly libelous statement was a statement of constitutionally protected pure opinion.

400 Mass., at 717, 512 N.E.2d, at 248.

In this case, just as in *King*, the Harkin charge against Secrist functions as factual support for Harkin's critical characterization of his opponent. The idea seemed to be to tar Secrist with the defamatory charge of illegal fundraising with the hope that some of this would rub off on Harkin's opponent, Senator Jepson.

There is certain language concerning the opinion issue in the District Court's ruling in this case that is disturbing. "The court agrees with defendants that there is no public context more contentious and more given to exaggeration than an American political campaign." (Appendix A at 4a). This language seemingly was endorsed by the Court of Appeals (Appendix B at 17b), and seems to suggest that there are different legal standards to be used in libel cases when in the context of a political campaign.

However to the contrary, this Court in *Connaughton* went out of its way to make clear that the standards are the same. This Court stated:

> Of course, the protection of "calculated falsehoods" does not promote self-determination. As we observed in *Garrison* v. *Louisiana*, 379 U.S. 64:
>
> "At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. *Id.*, at 75."

Connaughton, 491 U.S., at ____ n.34, 105 L.Ed.2d, at 588 n.34, 109 S.Ct., at 2696 n.34.

III. THE COURT OF APPEALS ERRED IN UPHOLDING SUMMARY JUDGMENT IN THIS CASE.

In 1986 this Court addressed the application of the actual malice standard in the context of motions for summary judgment. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

> In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the New York Times "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a New York Times case, *the appropriate summary judgment question will be whether the evidence on the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.*

477 U.S., at 255-56. (Emphasis added).

Quite simply, this Court is saying that summary judgment is not appropriate if the evidence is such that a reasonable jury could find actual malice by clear and convincing evidence. For the purposes of deciding a motion for summary judgment, the lower court is not to weigh the evidence and determine matters of fact, but to determine whether the evidence presented indicates a sufficient disagreement between the parties to require the matter to be decided by a jury, or

whether the evidence is so lop-sided that the defendants must prevail as a matter of law. This Court in *Anderson* went on to state:

> We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

477 U.S., at 257.

Throughout *Connaughton* this Court emphasized the importance of the jury and whether or not there was sufficient evidence in the record to support a jury verdict. The Court of Appeals in *Connaughton* had properly listed the evidence, as petitioner has done in this case, (*See, infra*, pages 9-11 of this petition) from which a jury could have found for the plaintiff, (491 U.S., at ____ n.36, 105 L.Ed.2d, at 590 n.36, 109 S.Ct., at 2697 n.36). This Court emphasized the importance of the fact that:

> The jury listened to the tape recordings of the two conflicting interviews and also observed the demeanor of the two witnesses as they testified in open court. They found that Connaughton was telling the truth and that Thompson's charges were false.

Connaughton, 491 U.S., at ____, 105 L.Ed. 2d, at 584-85, 109 S.Ct., at 2692.

This Court in *Connaughton*, by its emphasis on the role of the jury, is echoing the principles of *Anderson:*

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial

> on affidavits. *Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,* whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. . . . Neither do we suggest that the trial courts should act other than with caution in granting summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. . . .

Anderson, 477 U.S., at 255. (Emphasis added).

In this case these principles are especially important. Even a cursory examination of the deposition testimony of Harkin, Frew and McKinney, as contained in the record and quoted, in part, in this petition, demonstrates that witness credibility is a major issue in this case; however, the erroneous granting of respondents' motion for summary judgment completely strikes this important matter from thorough and proper jury consideration.

In *King*, the court reversed a lower court's ruling on a summary judgment motion in a libel case which had been decided in favor of the defendant. One of the primary issues was whether the defendant had entertained serious doubts about the truth of the publication. The court drew appropriate inferences from the evidence, applied the *Anderson* test, and reversed the summary judgment for defendant. The *King* court stated:

> . . . a jury may find that the author of a statement entertained serious doubts about the truth of his statement "on the basis of an inference drawn from objective evidence, since it would perhaps be rare for a defendant in such circumstance to admit to having had serious, unresolved doubts." We must

> review, then, the materials put before the judge to determine whether, "*considered with an indulgence in the plaintiff's favor*," they may demonstrate to a jury to a clear and convincing degree the presence of malice on Farrell's part. . . . See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242. . . .

400 Mass., at 720, 512 N.E.2d, at 250. (Emphasis added).

In the *King* case the defendant received information second hand that the plaintiff, Governor King of Massachusetts, called a certain judge and demanded that he change a decision. Defendant received this information from a source, the Treasurer of Massachusetts, who was also a close political advisor to King. The defendant reporter was aware that his source had heard the allegation from a third party. The defendant did not speak to the judge to verify the information and did not ask anyone else to do so. The defendant, an experienced journalist, realized that this was a serious charge. The court in *King* discussed the reasonable inferences which a jury could draw from this information.

> It would be reasonable to infer from the deposition testimony that Farrell, an experienced journalist, published as a fact that the plaintiff had engaged in conduct which, if known, would discredit him in the eyes of a considerable and respectable segment of the community, that Farrell knew that his statement was likely to have that effect, and that he knew that the conduct, if it had occurred, would have been highly unusual. Also, a jury would be warranted in finding that Farrell published the challenged statement without investigation or verification, and with the knowledge that the only information he had was hearsay, perhaps multi-level, that Crane (the person who related the information to Farrell) neither disclosed his source nor vouched for his source's reliability or for the reliability of his source's source, if there was one, and that the report to Crane was as

> likely to have been fabrication or speculation as to have been the truth.

400 Mass., at 721-22, 512 N.E.2d, at 251.

The court in *King* concluded by quoting this Court in *St. Amant*:

> . . . "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is base wholely on an unverified, anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." . . . *St. Amant* v. *Thompson*, *supra* 390 U.S. at 732 . . . We are satisfied that the evidence we have discussed would warrant a jury's finding of actual malice by clear and convincing evidence.

400 Mass., at 722, 512 N.E.2d, at 251.

The defendant's investigative failure in this case is far more egregious than the conduct of the defendant in *King*. In that case the defendant reporter relied upon an inherently reliable source. In this case the defendants had *no independent source* whatsoever and conducted *no investigation* prior to publishing the defamatory allegation that Secrist was involved in improper and illegal campaign fundraising for Senator Jepsen. Since summary judgment was reversed in

King, there is even more reason to reverse the summary judgment in this case.

This Court made clear in *Connaughton* that a higher court must make an independent *de novo* review of the *entire* record in cases such as this. (491 U.S., at ____, 105 L.Ed.2d, at 574-92, 109 S.Ct., at 2683-99). The Court of Appeals opinion in this case indicates that this review was not done. That court's analysis referred only to the evidence which supported respondents' position. The record below is clear that Secrist was not a candidate, that he was not involved in the campaign and that he did not raise campaign funds. This "politicians will be politicians" line of reasoning and argument is not appropriate in our courts when deciding these serious matters. Petitioner knows of no rule of law that condones this kind of thinking and it should be flatly rejected by this Court as it was in *Connaughton*.

CONCLUSION

The defendants in this case are experienced, astute, well educated professionals who were engaged in the most self-promoting and self-serving of activities. They acted with blatant, reckless disregard of the truth when they published the charge that plaintiff had been raising money for Harkin's political opponent, having no evidence that plaintiff had done so and conducting no investigation into the matter, but having full knowledge of the seriousness and consequences of their publication. The conclusion was useful and convenient, but it was also subject to easy verification, which defendants recklessly declined to do. As Secrist argued in the Courts below, but without using these exact words, Respondent's bad faith failure to investigate amounts to a purposeful avoidance of the truth and can only mean that they didn't want to know the truth because the truth would not have served their purposes. This was simply a reckless publication, authored by one of the defendants and approved by the other two, and it is clear from the cumulative evidence presented that they must

have known the statements were false, or they must have entertained serious doubts about the truth of their statements and acted in bad faith by publishing them. They were engaged in a bitter political campaign and were motivated by personal political gain to simply disregard the reputational damage inherent in their publication. Petitioner respectfully requests this court to grant the Petition for Certiorari, and, ultimately, to remand the case to permit trial by jury.

Respectfully submitted,

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APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAMES E. SECRIST, *Plaintiff,*	
v.	CIVIL NO. 86-730-A
UNITED STATES SENATOR TOM HARKIN, PAM MCKINNEY, JOHN FREW AND CITIZENS FOR HARKIN, *Defendants.*	RULING AND SUMMARY JUDGMENT

The court has now fully considered the defendants' resisted motion for summary judgment. The parties have presented helpful briefs and supporting papers, as well as excellent oral arguments at the hearing held on July 28, 1988.

The court concludes that no genuine issue of material fact remains for trial. The law applicable to the plaintiff's defamation claim fully supports the defendants' contention that summary judgment is warranted.

Summary judgment is properly granted when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The Supreme Court has recently provided further guidance on when summary judgment may appropriately be granted. *See Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). To avoid summary judgment, plaintiff must demonstrate that the asserted claim is based on a admissible evidence and a theory for recovery that is rationally based on fact and legal principles. Moreover, summary judgment may be employed more liberally when appropriate to protect a defendant's First

Amendment rights, since a defendant ought not be required to defend himself in a trial when the plaintiff has not made out a sufficient case in defamation and damages. *See Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

The facts which are not in genuine dispute are well summarized by the parties in their respective statements of material facts submitted with their motion for summary judgment and resistance. In particular, the essentially undisputed factual background and status of the parties is well documented in the defendants' statement of facts (filed June 3, 1988) at pages 3 through 22. The court is entirely satisfied from the factual materials presented with the motion and resistance that the plaintiff was at the time of the publication in question both a public official and public figure, as those concepts have been explained and applied in the cases of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278-80 (1964), and *Garrison* v. *Louisiana*, 379 U.S. 64, 76-77 (1964). *See also Janklow* v. *Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir. 1986):

> Certainly, speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment.*Id.* at 1304.

The plaintiff, a public official and public figure, could only succeed in this case with a showing by clear and convincing evidence that one or more defendants expressed their concern about plaintiff's work as part of Senator Jepsen's staff and reelection campaign with actual malice—publishing the information "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280; *Janklow*, 788 F.2d 1300, 1304-06; *Gertz* v. *Welch*, 418 U.S. 323, 342 (1974).

There is no question under the evidence present on this summary judgment record that the plaintiff had undertaken a course of conduct, working as a member of Senator Jepsen's

staff, that invited public attention and in fact attracted public attention to his actions. He had been an active lobbyist and continued to do that work after going to work on the Senator's staff. His activities certainly engendered public scrutiny and transformed his otherwise private actions into those of a limited public figure, even if he preferred no such public status. *See McDowell* v. *Paiewonsky*, 769 F.2d 942, 949-50 (3d Cir. 1985). The tremendous public controversy concerning the propriety of his original assignment to Senator Jepsen's staff, and concerning his activities on that staff, transformed any private nature of that work into a public issue which certainly deserved comment of the type that was here publicized during the election campaign.

Importantly here, the plaintiff has not demonstrated an evidentiary basis for the claim that any defendant acted with actual malice, either knowledge of falsity or with reckless disregard to whether the information in the press release was false or not. There is no showing that any defendant "entertained serious doubts as to the truth" of the press release, *see St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), nor that any defendant has a "high degree of awareness" that the press release was probably false. *Garrison*, 379 U.S. at 74. It is doubtful that plaintiff had even made a showing of negligence or gross negligence, but such a showing would not elevate the claim to constitutional magnitude. *New York Times*, 376 U.S. at 288.

Defendants certainly did intend the press release to make an impact on the public and demonstrate weakness in the qualifications of Senator Jepsen and a person the Senator had placed on his staff. The court concludes from all the evidence presented, without any genuine issue of dispute, that the Senator was the target of the press release, not the plaintiff who was a staff person. Certainly there is not the requisite proof by clear and convincing evidence that the defendants acted toward this plaintiff with actual malice or reckless disregard for the truth of statements contained in the

press release. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

The court agrees with defendants that there is no public context more contentious and more given to exaggeration than an American political campaign. It is in that context that this press release was issued. The court concludes that the readers of the publication of the press release, the important audience of voting citizens, would not interpret the press release as an improper accusation of criminal offenses by the plaintiff, but the challenger's contention that the incumbent Senator was politically motivated in using the services of the plaintiff, a career military person. This was clearly an extension of the substantial public debate and comment earlier about why the Defense Department allowed Senator Jepsen to have the plaintiff on his staff.

Additionally, the court is satisfied that the disputed text of the press release constituted opinion, not narrative facts. Opinion is the trademark of political rhetoric, even when set forth in narrative terms. Clearly the press release was a message entirely political in context and in wording.

On balance, the court is satisfied that if the extensive material submitted in support of and resistance to the motion for summary judgment were the evidence introduced at trial, the court would be obligated to direct a verdict for the defendants or, at the latest, set aside any verdict rendered for plaintiff and against any one of the defendants. Summary judgment is appropriate.

Defendants' motion for summary judgment is granted. Judgment shall be entered for defendants.

IT IS SO ORDERED.

Dated this 2nd day of August, 1988.

/s/

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT
COURT

United States District Court

SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAMES E. SECRIST,
Plaintiff,

v.

Judgement in a Civil Case

UNITED STATES SENATOR TOM HARKIN, PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN,
Defendants.

CASE NUMBER: 86-730-A

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendants and against the plaintiff, with plaintiff to pay the costs of this action.

August 2, 1988
Date

James R. Rosenbaum
Clerk

(By) Deputy Clerk

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2327

JAMES E. SECRIST, *Appellant,* v. TOM HARKIN, UNITED STATES SENATOR; PAM MCKINNEY; JOHN FREW; CITIZENS FOR HARKIN, *Appellees.*	86-730-A Appeal from the United States District Court for the Southern District of Iowa.

Submitted: March 13, 1989

Filed: May 9, 1989

Before WOLLMAN and MAGILL, Circuit Judges, and LARSON,* Senior District Judge.

LARSON, Senior District Judge.

In the summer of 1983, appellant James E. Secrist was assigned to Senator Roger W. Jepsen's personal office staff. At the time of his assignment, Secrist was a Lieutenant Colonel in the United States Marine Corps, and his $45,000 salary continued to be paid by the Marine Corps. Jepsen, who chaired the Manpower and Personnel Subcommittee of the Senate Committee on Armed Services, had secured Secrist's

* The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

appointment through a personal request to the Secretary of the Navy.

The appointment generated controversy in the press and became a campaign issue when Jepsen sought reelection in 1984. In October, 1984, challenger Tom Harkin's campaign committee issued a press release pertaining to Secrist's role on Jepsen's staff. Secrist alleges in this action that certain statements in the October press release were defamatory.

The district court[1] granted summary judgment against Secrist. Because we agree with the district court that the challenged statements are protected expressions of opinion, and, even if fact, that Secrist failed to produce sufficient evidence that the statements were made with actual malice, we affirm.

I.

Secrist first became acquainted with Senator Jepsen while acting as a Pentagon legislative liaison, lobbying the United States Senate Armed Services Committee and its subcommittees, including the Subcommittee on Manpower and Personnel which Jepsen chaired. Secrist had been scheduled to begin a one year tour with the First Marine Aircraft Wing in Okinawa, Japan, when Jepsen requested he be assigned to his personal staff through the remainder of the 98th Congress.

Although an internal Marine Corps memorandum recommended strongly that the request be denied, the Secretary of the Navy acceded and commencing on July 1, 1983, Secrist officially joined Jepsen's staff. Secrist's duties for Jepsen included assisting Iowa businesses in obtaining defense contracts and investigating military personnel matters.

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[1] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

Secrist's appointment was reported in both the national and local press. Articles and editorials appeared in the Congressional Quarterly, the New York Times, the Washington Post, and the Chicago Tribune shortly after Secrist joined Jepsen's staff. Many Iowa papers also carried stories relating to Secrist's appointment. The Des Moines Register ran an editorial on August 12, 1983, entitled "Jepsen's Private Marine," which stated that Jepsen had "'found a novel way to get high-priced staff help' at no cost to his Senate staff budget." Citing statements both pro and con concerning whether the appointment violated Department of Defense regulations, the Register commented that the rules had been stretched "about as far as they can stretch without actually snapping."

The editorial also questioned Jepsen's statement that Secrist would be useful in obtaining military contracts for defense businesses:

> A Marine lieutenant colonel has *that* kind of influence? But, in his snappy uniform, he ought to improve the scenery around Jepsen at election-year hearings and other gatherings in Iowa. (We hope that he won't feel required to open car doors for the senator.)

Several days later, the paper published a letter from Jepsen responding to the editorial and defending his efforts to assist Iowans compete more effectively for defense dollars. After commenting that any contract awarded to Iowa would be the result of successful efforts by Iowa businesses, and not through any special "influence" on Secrist's part, the Senator rebutted the implication that Secrist's appointment was a part of his election campaign strategy. The Senator stated:

> Also, you will look in vain for Lt. Col. Secrist at any election-year hearings or public event in Iowa next year. His responsibilities lie in service to Iowa, not in "opening my car door."Articles also appeared in the Cedar Rapids Gazette, the Quad City Times,

and other Iowa papers; some supporting Jepsen's decision to secure Secrist's appointment and others, like the Des Moines Register, opposing it.

In March of 1984, Jepsen, a Republican, officially declared his intention to seek reelection to the United States Senate. Democratic party officials were quoted in the press at that time as questioning Jepsen's judgment in connection with the Secrist appointment. These officials argued Secrist's appointment was one of the reasons why Jepsen should be defeated.

During this same time period, Secrist was coordinating a federal procurement conference in Des Moines for approximately 400-500 small and medium sized Iowa businesses. Secrist traveled to Iowa numerous times on behalf of Jepsen, and twice—in May and June of 1984—Jepsen's campaign committee reimbursed Secrist for his travel expenses.

Although Jepsen's challenger, then United States Representative Tom Harkin, had declined to comment on the Secrist appointment issue when it first arose, Harkin's campaign committee issued a press release concerning the matter as the campaign drew to a close. The press release, entitled "The Jepsen Colonel Caper," questioned Jepsen's motives in securing Secrist's appointment, implying the appointment had effectively enhanced Jepsen's campaign contributions, but had not been successful in increasing Iowa's share of defense contracts. Attached to the release was a list of the campaign contributions received by the Jepsen '84 committee from 31 companies listed on the release as defense contractors.

Jepsen responded to the press release by labeling Harkin's charges as "nothing short of libelous." Jepsen stated that Secrist at no time solicited any campaign donations on Jepsen's behalf, nor had Secrist met with any political action committees. Noting that Secrist had been instrumental in creating 1,524 new Iowa jobs and in securing $452.3 million

in new or pending defense contracts, Jepsen explained Secrist's travel had been paid for by his campaign because Secrist was not eligible for reimbursement from either the military or the Senate.

Harkin won the election, and now serves in the United States Senate representing the State of Iowa. Secrist retired from the Marine Corps in March of 1985 and now acts as a lobbyist for Rockwell International in Washington, D.C.

II.

In October of 1986, two years after the press release was issued, Secrist filed suit against defendants Pam McKinney, Harkin's press secretary; John Frew, Harkin's campaign manager; and Harkin himself, alleging the release was libelous because it implied he was actively soliciting funds on behalf of Jepsen, a violation of the Hatch Act which could have subjected him to two years imprisonment under the Uniform Code of Military Justice.

Secrist alleged the following underlined statements from the first, sixth, twelfth, and thirteenth paragraphs of the press release were defamatory:

> *A pentagon Marine Colonel assigned to drum up defense contracts for Iowa businesses has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.*
>
> * * *
>
> *Since its formation, the Jepsen '84 Committee has received more than $88,000 from defense contractors' contributions, including Lockheed, Boeing, TRW and LTV; about 60 percent of that amount was received after Secrist joined the Jepsen staff.*
>
> * * *

> *According to Harkin, Lt. Col. Secrist's involvement is clear.* In the May 17-June 30, 1984 Federal Election Commission Report, Secrist's name appeared twice for reimbursement of more than $1,000 for travel expenses during that period. The reimbursements were made from Jepsen's office account. That office account has also come under fire this year for failure to report funds to the Federal Election Commission and the Internal Revenue Service.
>
> *"While the Lt. Col. may not be opening the Senator's car doors," Harkin said. "It appears that he is successful at opening doors to defense campaign money coffers on behalf of the Senator."The complete text of the press release is reprinted as an Appendix to this opinion.*

After the close of discovery, defendants moved for summary judgment. The district court held plaintiff Secrist was a public official and a public figure,[2] and hence was required to show by clear and convincing evidence that each defendant acted with actual malice in publishing the statements contained in the press release. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964); *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 476 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1247 (1988); *Hoffman v. Washington Post*

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[2] In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974), the Supreme Court identified two bases for determining whether an individual is a public figure:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

Id. (cited in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 246 n.3 (1986)). The district court in this case found Secrist was a limited-purpose public figure based upon his undertaking of the assignment to Senator Jepsen's personal staff. *See Anderson*, 477 U.S. at 246 n.3. Secrist does not challenge this ruling on appeal.

Co., 433 F. Supp. 600, 605 (D.D.C. 1977), *aff'd mem.*, 578 F.2d 442 (D.C. Cir. 1978).

The district court found no evidentiary basis for plaintiff's claim that any defendant acted with actual malice—either knowledge of falsity or with reckless disregard as to whether the information in the press release was false or not. *See St. Amant* v. *Thompson*, 390 U.S. 727, 728 (1968). In addition, the court concluded that in the context of a political campaign, the audience of voting citizens would interpret the release as a challenger's contention that Senator Jepsen was politically motivated in securing Secrist's services, "clearly an extension of the substantial public debate and comment earlier about why the Defense Department allowed Senator Jepsen to have the plaintiff on his staff." Ruling that the disputed portions of the press release constituted protected opinion, the court stated: "Opinion is the trademark of political rhetoric, even when set forth in narrative terms. Clearly the press release was a message entirely political in context and in wording."

Secrist challenges the court's ruling on appeal, arguing the press release falsely accuses him of directly soliciting defense contractors for campaign contributions on behalf of Senator Jepsen, which Secrist contends is a statement of fact, not opinion. Secrist also maintains a genuine issue of material fact exists on the question of malice, primarily because of defendants' failure to investigate his activities prior to publishing the release. Secrist contends defendants were all experienced politicians, who easily could have called Secrist or the defense contractors who contributed to Jepsen's campaign committee to find out whether Secrist had been directly involved in fundraising. Their failure to do so, according to Secrist, amounts to actual malice.

III.

We begin with the proposition that defendants are liable only for false statements of fact: expressions of opinion are protected by the First Amendment. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974); *Deupree* v. *Iliff*, 860 F.2d 300, 304 (8th Cir. 1988); *Janklow* v. *Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986). The district court correctly granted summary judgment in this case if the challenged statements are opinion, rather than fact, because this issue is one of law for the court to decide. *Deupree*, 860 F.2d at 303; *Janklow*, 788 F.2d at 1305 n.7.

In determining where to draw the line between what constitutes "fact" and "opinion," we are guided by this Court's en banc decision in *Janklow* as well as our more recent decision in *Deupree*. In *Janklow*, the Court adopted an expanded version of the four factors suggested by the majority opinion in *Ollman* v. *Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). *See Janklow*, 788 F.2d at 1302-03. Two of these factors require an examination of the specific language used: how precise and how verifiable are the challenged statements? The remaining factors consider the context, both the literary context and the broader public context, in determining how readers or listeners would regard the statements: does the context signal that opinion is being offered? *See id.; Deupree*, 860 F.2d at 303; *Ollman*, 750 F.2d at 979-84, 1000-05.

We consider first the context of the statements at issue here, since "[c]ontext is crucial and can turn what, out of context, appears to be a statement of fact into 'rhetorical hyperbole,' which is not actionable." *Ollman*, 750 F.2d at 1000 (J. Bork, concurring). *See Deupree*, 860 F.2d at 303; *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). There may be no public

context more contentious than a political campaign. *See generally New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273 n.14 (1964); *Ollman*, 750 F.2d at 1005 (J. Bork, concurring). While political commentators often decry the "low level" of campaign tactics or rhetoric, the debate which accompanies public examination of candidates for public office lies at the very heart of the First Amendment and is essential to our democratic form of government. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Janklow*, 788 F.2d at 1304.

> It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.

New York Times, 376 U.S. at 281 (citing *Coleman v. MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908)).

In recognition of the importance of "uninhibited, robust and wide-open" political debate, and of the "vehement, caustic, and sometimes unpleasantly sharp attacks" which often follow such debate, *see New York Times Co.*, 376 U.S. at 270, courts have recently suggested that those who place themselves in the political arena or willingly participate in public debate "must accept a degree of derogation that others need not." *Janklow*, 788 F.2d at 1304 n.5 (citing *Ollman*, 750 F.2d at 1002 (J. Bork, concurring)). They must, in effect, have "tougher hides." *See Ollman*, 750 F.2d at 1005.

There can be no doubt but that in this case Lt. Col. Secrist found himself in the midst of a political controversy.[3] The statements he challenges in this appeal were part of a political campaign, issued in a press release by a challenger to an incumbent Senator concerning Secrist's employment on the Senator's staff. It is difficult to imagine a public context which would point more strongly toward "opinion" than this one. *See Janklow*, 788 F.2d at 1303. *Cf. Deupree*, 860 F.2d at 303-04 (call in radio show forum for discussing sex education in schools); *Janklow*, 788 F.2d at 1304-05 (motivations of Governor in directing investigation); *Ollman*, 750 F.2d at 1002-05 (controversial professor's candidacy for chair of department of politics and government at University of Maryland).

The literary context of the press release also supports a finding that the challenged statements are Candidate Harkin's opinion, rather than "fact." The "literary context" factor includes the type of forum or "social context" in which the statement was made, the category of publication, its style of writing, and the intended audience. *Janklow*, 788 F.2d at 1302-03. The forum or social context in this case is, as we have said, a political campaign, in which one would expect to hear a great deal of opinion concerning the performance of the incumbent Senator. The category of publication is a press release from the Senator's challenger. Suffice it to say that a campaign press release is not a research monograph; such a release is at least as likely to signal political opinion as a newspaper editorial or political cartoon. *See Ollman*, 750 F.2d at 986-87; *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 512 N.W.2d 241, 245 (1987), *cert. denied*, 108 S.Ct. 1121, 1227 (1988).

---

[3] While Secrist was assigned by his superiors to Jepsen's staff, both Jepsen and Secrist acknowledge Secrist was asked by Jepsen if he would be interested in the position prior to any efforts on Jepsen's part to secure Secrist's appointment. Secrist testified he indicated to Jepsen that he was interested.

The writing style of the release is opinion-oriented as well. As the district court found, the press release "was a message entirely political in context and in wording," which the audience of the voting public would clearly interpret as challenger Harkin's "contention that the incumbent Senator was politically motivated in using the services of the plaintiff, a career military person."

The language of the release, considered as a whole, supports the district court's interpretation. The release directly attributes three of the challenged statements to candidate Harkin, which, given the other statements in the release, signals that readers should expect Harkin's opinion. Harkin's statements are accompanied by background information on Secrist's appointment, quotes from news articles which reported on the controversy surrounding the appointment, and Jepsen's own response to the controversy, including Jepsen's remark that Secrist would not be "opening my car door." Harkin's repetition of the "car door" phrase further suggests his comments represent his opinion of Jepsen's motivation in securing Secrist on his staff. *Cf. Deupree*, 860 F.2d at 303; *Ollman*, 750 F.2d at 982-83.

Finally, we turn to the precision and verifiability of the challenged statements themselves. Secrist claims the press release accuses him of a violation of the Hatch Act, which as a military officer could subject him to two years' imprisonment, because it states (1) he "has been more successful at raising money for Sen. Roger Jepsen's reelection bid" than helping Iowa businesses obtain defense contracts; (2) 60% of the more than $88,000 received by the Jepsen campaign committee was received after Secrist joined the staff; and (3) Secrist was "successful at opening doors to defense campaign money coffers on behalf of the Senator."

The press release contained a list of the contributions received from companies identified as defense contractors as reported by the Jepsen reelection campaign committee, and Secrist does not challenge the statement that 60% of the funds

were received after July 1, 1983, when he joined Jepsen's staff. What Secrist challenges is the inference he draws from all three statements that he played a role in the Senator's successful fundraising efforts.

We are thus faced with the issue of whether statements concerning "successful fundraising" and "opening doors to defense money coffers" are sufficiently precise and verifiable to constitute statement of fact. Statements which are "loosely definable" or "variously interpretable" cannot in most contexts support an action for defamation. *Ollman*, 750 F.2d at 980. While Secrist maintains the release necessarily implies he was actively involved in the direct solicitation of funds, we are not convinced that "fundraising" has as precise a meaning as Secrist implies. There is no evidence in this record that Secrist ever directly solicited campaign contributions for Senator Jepsen. Nonetheless, as Harkin's press secretary testified, there are numerous ways of raising money for an incumbent Senator:

> One of the ways is to go out and actually solicit contributions, ask people for money.
>
> Another way is simply through what can be referred to as goodwill fund raising, or fund raising that occurs because an employee or someone who is working on your behalf goes out and does a job for someone that results in a campaign contribution.
>
> By his very presence on Senator Jepsen's staff, Jim Secrist sent a signal to the defense community, by the fact that the Secretary of the Navy was willing to do something very unusual, something that the Pentagon said was extremely unusual, that being detail a Marine Lieutenant Colonel to the personal staff of a United States Senator to supplement that staff, to act as a liaison between the Senator's office, defense contract[ors], and businesses in Iowa.

> That sends a signal that this particular Senator is a friend and is someone to support.
>
> And to the extent that any of that message resulted in campaign contributions from defense contractors, then Mr. Secrist raised money.
>
> To the extent that any small business person in the state of Iowa that Colonel Secrist worked with and helped out was pleased enough to support Senator Jepsen's campaign for a campaign contribution or to support the campaign in another way that led to a campaign contribution, Colonel Secrist raised money.
>
> To the extent that Colonel Secrist was traveling in Iowa, meeting with small business people, acting as the Senator's emissary, if you will, assisting small businesses and enhancing Senator Jepsen's reputation with these small business people, and that resulted in campaign contributions, then Colonel Secrist was raising money.

Secrist agrees that he was "very active on behalf of Iowa for almost two years," and that he "assisted hundreds of Iowa business firms in their efforts to sell to the government." Whether his efforts or his presence on the staff contributed to Jepsen's "successful fundraising" is not as easily verifiable as Secrist suggests, and we find that in context the challenged statements concerning fundraising are not so precise, specific, or verifiable that they can be equated—as Secrist alleges—as akin to an accusation of criminal conduct. *Cf. Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-85 (1974) (epithet "traitor" was opinion, not imputation of actual criminal conduct in context of labor dispute); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) ("blackmail" charge represented opinion of developer's tactics, not accusation of a crime). *See also Deupree*, 860 F.2d at 303.

We conclude that under all of the circumstances surrounding publication of the press release, the challenged statements could only be interpreted by readers of the release as Harkin's opinion on the effect of Secrist's appointment to Jepsen's staff. Accordingly, we find the district court correctly granted summary judgment against Secrist because the statements of which he complains are absolutely protected by the First Amendment.

IV.

Even if the statements concerning "successful fundraising" or "opening doors to defense campaign money coffers" could be construed as statements of fact, however, we would affirm the district court's grant of summary judgment in this case, because we also agree with the district court that Secrist failed to present sufficient evidence that defendants acted with actual malice.

To withstand a motion for summary judgment, a public official or public figure must present evidence to support a jury finding that he or she has shown with convincing clarity that a defendant acted with actual malice. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 257 (1986); *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d 1287, 1292-93 (D.C. Cir.), *cert. denied*, 109 S.Ct. 75 (1988); *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 476 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1247 (1988). Actual malice means acting with knowledge that the challenged statements were false or with reckless disregard for whether they were false or not. *New York Times*, 376 U.S. at 280. In evaluating whether summary judgment should be granted, we are obliged to make our own independent review of the record to ensure the principles of actual malice are constitutionally applied. *Id.* at 285; *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 511 (1984); *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d at 1293; *Speer*, 828 F.2d at 476-77.

Secrist makes no claim that defendants in this case acted with knowledge that their statements were false. Thus, in order to succeed in his libel action, Secrist must establish they acted with "reckless disregard," that is, they "in fact entertained serious doubts as to the truth of [their] publication," *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), which amounted to a "high degree of awareness of . . . probable falsity." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). *See Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d at 1292-93; *Speer*, 828 F.2d at 478.

A review of the evidence presented in this case convinces us Secrist has not met his burden. At the time Harkin's press secretary Pam McKinney drafted the press release at issue, she had been told the following information: (1) while in a Des Moines restaurant, Teresa O'Brien, a Harkin staff member, had overheard two individuals whom she believed to be Secrist and a Jepsen staff member discussing something they were going to do for Jepsen's campaign in Iowa; (2) Jepsen's campaign committee had twice reimbursed Secrist for travel expenses; (3) Department of Defense expenditures in Iowa had decreased since Secrist joined Jepsen's staff; and (4) Jepsen had reported an increase in contributions from defense-contractor political action committees since Secrist's appointment. Defendants Harkin and his campaign manager John Frew had basically been told the same information.

All three defendants admitted they conducted no further investigation of the defense contractors who had contributed to Jepsen's campaign or of Secrist himself to determine whether Secrist had directly solicited funds on behalf of Jepsen. Secrist points to this lack of investigation as evidence of reckless disregard for the truth. We cannot agree. Reckless conduct is not measured by whether a reasonably prudent person would have published, "*or would have investigated before publishing.*" *St. Amant*, 390 U.S. at 731 (emphasis added). *See Speer*, 828 F.2d at 478.

In *St. Amant*, the Supreme Court reversed a state court judgment against defendant St. Amant, who had published statements of a union member, Albin, falsely charging plaintiff Thompson with criminal conduct. 390 U.S. at 728-29, 733. The Court ruled St. Amant had not acted with reckless disregard for the truth, even though he had no personal knowledge of Thompson's activities, he failed to verify Albin's statements with union officials, and he gave no consideration to whether or not the statements defamed Thompson. *Id.* at 730. The Court explicitly stated "[f]ailure to investigate does not in itself establish bad faith." *Id.* at 733.

Likewise in *Speer*, this Court held persons having responsibility for publication of a newspaper editorial did not act with reckless disregard in adopting a version of an arrest given by a trusted employee over that of plaintiff Speer and other citizen witnesses. 828 F.2d at 478. We found the paper in hindsight should prudently have pursued its known leads on the story before publishing the editorial, but nonetheless held "a negligent failure to investigate does not itself establish recklessness for purposes of a libel suit." *Id. See New York Times*, 376 U.S. at 287-88.

Secrist attempts to distinguish *St. Amant* and *Speer* by citing *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 512 N.E.2d 241 (1987), *cert. denied*, 108 S.Ct. 1121 (1988(, in which the Supreme Judicial Court of Massachusetts reversed a grant of summary judgment in favor of the Globe Newspaper Company and Globe reporter David Farrell. Farrell had written an article which was published by the Globe and which accused then Governor King of calling a judge and demanding the judge change a decision rendered in a gang-rape case. 512 N.W.2d at 248. The reporter testified his only source for the statement was then State Treasurer Robert Crane. *Id.* at 250. When Crane testified he had not heard the conversation himself but only learned of it through an informant whom Crane could not name, the court held a jury would be warranted in finding Farrell had "obvious reasons

to doubt the veracity and accuracy, not only of Crane, but of Crane's undisclosed informant and any other informants in the chain of communication." *Id.* at 251.

In this case, defendants relied upon public reports filed by Jepsen's campaign committee and issued by the Department of Defense, as well as the observation of a staff member whose credibility has not been questioned.[4] Defendants certainly cannot avoid liability by simply asserting that they published the press release in the good faith belief the statements were true, but nothing in this record suggests with convincing clarity that defendants acted in bad faith. Their statements concerning the effect of Secrist's presence on Jepsen's ability to raise money were not so implausible that only a reckless person would have published them, nor is there any evidence that the statements were entirely a product of defendants' imaginations. *See St. Amant*, 390 U.S. at 732-33; *Speer*, 828 F.2d at 478.

V.

In sum, we agree with the district court's conclusion that summary judgment in favor of defendants is warranted because the statements challenged by Secrist in this appeal, made in the context of a political campaign by a challenger to an incumbent Senator and directed at the Senator's motives for securing Secrist's appointment to his personal staff, constitute protected statements of opinion under the First Amendment. Moreover, even if the statements could be construed as fact, we further agree with the district court that

---

[4] Secrist admits Harkin staff member Teresa O'Brien may have overheard Jepsen staff member Kirk Farrell "explaining to me his campaign plans and activities." Secrist stated that the conversation occurred in a social setting and was not meant to brief him on campaign activities or involve him in the campaign, but rather Farrell was simply relating to Secrist what Farrell had been doing.

Secrist has failed to submit sufficient evidence of actual malice. The judgment of the district court is in all respects affirmed.

APPENDIX
THE JEPSEN COLONEL CAPER

DES MOINES—A pentagon Marine Colonel assigned to drum up defense contracts for Iowa has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.

Lt. Col. James E. Secrist was the subject of controversy last year when the Pentagon paid his $45,000 annual salary while assigning him to work as a member of Sen. Jepsen's personal Washington staff.

According to the Navy and Sen. Jepsen's office, Secrist was assigned to Jepsen to assist businesses in Iowa with the Pentagon's procurement process and obtain more defense contracts for the state.

During the time Secrist has been on the Jepsen staff, however, the percentage of national defense contract dollars awarded to Iowa businesses has not increased.

In the first half of FY 1984, Iowa has only received $132 million from defense contracts, approximately one-third of the total received in 1983. (Source: Department of Defense Office of Information).

Since its formation, the Jepsen '84 Committee has received more than $88,000 from defense contractors' contributions, including Lockheed, Boeing TRW and LTV; about 60 percent of that amount was received after Secrist joined the Jepsen staff.

Secrist's assignment to the Jepsen office staff was approved in May of 1983 after the Senator personally sought and received permission from the Secretary of the Navy.

As chairman of the Armed Services Subcommittee on Manpower and Personnel, Jepsen oversees the process which

sets employee ceilings for each military branch and has jurisdiction over military pay and benefits.

[Illegible] . . . approved Secrist's assignment to Jepsen's office in response to a May 24, 1983 letter from Jepsen to Navy Secretary John F. Lehman Jr. In the letter, Jepsen asked Lehman to "take action to assign Lieutenant Colonel Secrist to my personal staff through the remainder of the 98th Congress." Secrist became a member of the Jepsen Staff on July 1, 1983.

Congressional Quarterly also reported, "Defense Department rules (Directive 1000.17) governing the assignment of employees to non-department offices point out that such assignments are 'generally not favored and shall be rigorously controlled' and will be made 'only in furtherance of specifically identifiable interests of the Defense Department.' Neither Defense Department nor Navy spokesmen could name the 'specifically identifiable interests' furthered by Secrist's assignment." (CQ page 1660 Aug. 13, 1983).

In an August 20, 1983 letter to the Des Moines Register, Jepsen wrote, "Also, you will look in vain for Lt. Col. Secrist at any election-year hearings or public event in Iowa next year. His responsibilities lie in service to Iowa not in 'opening my car door.'"

According to Harkin, Lt. Col. Secrist's involvement is clear. In the May 17-June 30, 1984 Federal Election Commission Report, Secrist's name appeared twice for reimbursement of more than $1,000 for travel expenses during that period. The reimbursements were made from Jepsen's office account. That office account has also come under fire this year for failure to report funds to the Federal Election Commission and the Internal Revenue Service.

"While the Lt. Col. may not be opening the Senator's car doors," Harkin said. "It appears that he is successful at opening doors to defense campaign money coffers on behalf of the Senator."

A true copy.

Attest: _____

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 89-220

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JAMES E. SECRIST,
Appellant,
v.
UNITED STATES SENATOR TOM HARKIN,
PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN,
Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals departed from generally applicable standards in holding that the statements in dispute were constitutionally protected opinion where the statements in dispute addressed issues raised in a heated 1984 campaign for the United States Senate, used colorful and hyperbolic language, addressed the unverifiable motives of public officials, and contained numerous indicators of opinion.

PARTIES

James E. Secrist

Tom Harkin

Pam McKinney

John Frew

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 874 F.2d 1244. The opinion of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1989. The petition for a writ of certiorari was filed on August 7, 1989 and amended on August 25, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Background and Summary.* At the time the statements in dispute in this case were made, former Marine Lieutenant Colonel James E. Secrist, plaintiff and petitioner here, had been assigned by former Secretary of the Navy Lehman to serve on the personal Congressional staff of former United States Senator Roger W. Jepsen, during Senator Jepsen's 1983-84 campaign for the United States Senate seat from Iowa. Throughout this assignment, Col. Secrist was on official Marine Corps duty with his salary paid by the Marine Corps. (Pet. App. at 1b-2b). Senator Jepsen, who was chairman of a United States Senate Armed Services subcommittee, had arranged the assignment personally, and Col. Secrist, who had been a Congressional liaison, or lobbyist, for the Pentagon to that time, had accepted the assignment to serve on Senator Jepsen's personal staff in lieu of a scheduled tour of duty in Okinawa, Japan. (*Id.*).

The assignment created controversy within the military and in the press. Col. Secrist's stated duties included helping Iowa businesses obtain military procurement contracts, in the course of which he made numerous trips to Iowa during the campaign. It is undisputed that, after Col. Secrist joined Senator Jepsen's staff, campaign contributions from defense industry political action committees, or PAC's, to Senator Jepsen increased. It is also undisputed that a number of Col. Secrist's trips to Iowa during the campaign were paid for from Senator Jepsen's campaign funds.

Respondent Tom Harkin was at that time a United States Congressman from Iowa and a candidate for the Senate seat occupied by Senator Jepsen. (Pet. App. at 4b). The disputed statements were made in a campaign

press release issued by Citizens for Harkin,[1] respondent Harkin's campaign committee, late in the campaign, after learning that Col. Secrist's travels in Iowa were compensated from campaign funds and that defense industry contributions to Senator Jepsen's campaign increased after Col. Secrist's assignment. Representative Harkin issued a satiric and ironic press release entitled "The Jepsen Colonel Caper," (Pet. App. 19b), which said that Secrist, who had not succeeded in getting defense contracts for Iowa businesses, "has been more successful at raising money for Sen. Roger Jepsen's reelection bid," and that Col. Secrist "appears [to be] . . . successful at opening doors to defense campaign money coffers on behalf of [Sen. Jepsen]." (Pet. App. at 19b, 20b). Respondent Pam McKinney drafted the release, and respondents Harkin and John Frew approved the release for distribution. (Pet. App. at 5b).

Respondent Harkin defeated Senator Jepsen in the election and now serves as United States Senator from Iowa. (Pet. App. at 5b). After the press release was issued and shortly after he was eligible to do so with full military retirement pay, Col. Secrist became a paid lobbyist for Rockwell International Corporation, a defense contractor. (Pet. App. at 5b). In the first three years after his retirement from the military, Col. Secrist's annual income increased from approximately $45,000 to approximately $96,000. (Pet. App. 1b; SF [2] at ¶ 75).

2. Through the press release, Senator Harkin entered on ongoing public debate concerning the propriety of Col.

---

[1] Citizens for Harkin was never properly served and is not a party to this lawsuit.

[2] The district court stated that "the essentially undisputed factual background and status of the parties is well documented in the defendants' statement of facts (filed June 3, 1988) at pages 3 through 22." (Pet. App. at 2a). The statement of facts cited will be referenced "SF" in this brief and will be cited by page and/or paragraph number.

Secrist's activities during the assignment. (Pet. App. 4b). By the assignment, Senator Jepsen had obtained a "Special Assistant" who was concurrently an active-duty lieutenant colonel in the United States Marine Corps being paid by the Marine Corps and whose primary task during the campaign was to obtain defense procurement contracts for businesses located in Iowa, i.e., for Senator Jepsen's constituents. (Pet. App. 1b-4b, 13b; SF at 12-15).

3. The impact on the campaign of placing a Marine Corps officer being paid by the Defense Department on the personal staff of a Senator running for re-election was predicted, and Senator Jepsen and Col. Secrist were widely criticized within the military and in the press for the assignment. (Pet. App. at 3b; SF at 9-10). An August, 1983 article in *Congressional Quarterly* analyzed the legal ramifications of the assignment and concluded that it was made "[i]n apparent disregard of Defense Department regulations." (SF at ¶ 28 (citing exh. 18)). This had also been the conclusion of an internal legal memorandum prepared by the Marine Corps.[3]

An August 12, 1983 editorial in the *Des Moines Register* describing the assignment as "a unique and highly questionable first" commented:

> Even if the arrangement is legal, though, it is without justification. Jepsen says that Secrist, whom he met when the Colonel was serving as a Pentagon lobbyist in the Senate, will be useful in obtaining military contracts for Iowa businesses.

(SF at ¶ 31). Moreover, the editorial questioned whether Col. Secrist would be useful in such a role:

---

[3] Questions about the propriety of the assignment were raised within the military before the assignment was made. A memorandum of law reviewed by Marine Corps Commandant. P.X. Kelley recommended strongly that Col. Secrist not be assigned to Senator Jepsen's staff. (Pet. App. at 2b; SF at ¶ 27).

> A Marine lieutenant colonel has *that* kind of influence? But, in his snappy uniform, he ought to improve the scenery around Jepsen at election-year hearings and other gatherings in Iowa. (We hope that he won't feel required to open car doors for the senator.)

(Pet. App. at 3b). The editorial concluded that Senator Jepsen had in fact merely " 'found a novel way to get high-priced staff help' at no cost to his Senate staff budget." (*Id.*).

An August 16, 1983 editorial in the *Washington Post* entitled "No, Senator Jepsen," criticized the Navy and Senator Jepsen for assigning Col. Secrist to do casework on behalf of Iowa constituents because of its "substantial" political impact. (SF at ¶ 32). An August 14, 1983 editorial in the *Chicago Tribune* entitled "Sen. Jepsen is one smart cookie" said:

> A good Marine would have—should have—told Sen. Jepsen to go fly a kite.

The next day another editorial in the *Chicago Tribune* entitled "Jepsen's Private Colonel" stated:

> The colonel may appreciate the duty station; the weather in Washington is not as good as Japan's. But his duty as an officer is to provide this country with the strongest possible defense. Since the Congress is chiefly responsible for . . . wasteful practices . . ., the colonel seems to be serving on the wrong side.

(SF at ¶ 28 (citing exh. 24)).

4. As predicted, and as admitted by Col. Secrist, many of his activities on behalf of Senator Jepsen during the campaign did have a beneficial impact on Senator Jepsen's campaign. (SF at 12-20 & ¶ 64; Pet. App. at 4b). During the campaign, Col. Secrist traveled to Iowa numerous times on behalf of Senator Jepsen, (Pet. App. at 4b), and contacted hundreds of Iowa citizens and busi-

nesses. (SF at ¶ 37-44). Senator Jepsen's campaign committee reimbursed Col. Secrist for at least two of those trips because the military could not reimburse him. (Pet. App. at 4b-5b; SF at ¶ 43).

5. Late in the campaign, respondents Harkin, McKinney, and Frew learned several facts fulfilling the predictions of abuse. As the court of appeals found:

> (1) while in a Des Moines restaurant, Teresa O'Brien, a Harkin staff member, had overheard two individuals whom she believed to be Secrist and a Jepsen staff member discussing something they were going to do for Jepsen's campaign in Iowa; (2) Jepsen's campaign committee had twice reimbursed Secrist for travel expenses; (3) Department of Defense expenditures in Iowa had decreased since Secrist joined Jepsen's staff; and (4) Jepsen had reported an increase in contributions from defense-contractor political action committees since Secrist's appointment.

(Pet. App. at 15b). In the press release, which was entitled "The Jepsen Colonel Caper" and was reprinted as an appendix by the court of appeals, (Pet. App. at 19b-20b), respondents satirically and ironically reported the new evidence substantiating the foreseeable and foreseen consequences of Col. Secrist's arrangement and reported the two comments by Senator Harkin that Col. Secrist finds objectionable:

> A pentagon Marine Colonel assigned to drum up defense contracts for Iowa businesses has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.
>
> * * * *
>
> "While the Lt. Col. may not be opening the Senator's car doors," Harkin said: "It appears that he is successful at opening doors to defense campaign money coffers on behalf of the Senator."

(Pet. App. at 4, 5b-6b).

6. *Proceedings Below.* Petitioner Col. Secrist filed this libel action pro se[4] in the United States District Court for the Southern District of Iowa on October 10, 1986, two years after the press release was issued and after he had retired from the military to become a lobbyist for a defense contractor. After thorough discovery by all parties, respondents moved for summary judgment, and, on August 2, 1988, the district court granted respondents' motion on two first amendment grounds without reaching other issues raised by respondents.

Specifically, the court ruled that Col. Secrist, a public official and a public figure, had failed to produce clear and convincing evidence of actual malice:

> There is no showing that any defendant "entertained serious doubts as to the truth" of the press release, . . . nor that any defendant has a "high degree of awareness" that the press release was probably false . . . . It is doubtful that plaintiff had even made a showing of negligence or gross negligence, but such a showing would not elevate the claim to constitutional magnitude.

(Pet. App. at 3a). The district court also ruled that

> the disputed text of the press release constituted opinion . . . . Opinion is the trademark of political rhetoric, even when set forth in narrative terms. Clearly the press release was a message entirely political in context and in wording.

(Pet. App. at 4a).

7. In a lengthy analysis of the law and facts, an Eighth Circuit panel unanimously affirmed on the ground that the statements at issue were opinion absolutely protected by the first amendment because of their context and wording:

---

[4] Petitioner retained counsel shortly after the suit was filed and has been represented since that time.

> We conclude that under all of the circumstances surrounding publication of the press release, the challenged statements could only be interpreted by readers of the release as Harkin's opinion on the effect of Secrist's appointment to Jepsen's staff. Accordingly, we find the district court correctly granted summary judgment against Secrist because the statements of which he complains are absolutely protected by the First Amendment.

(Pet. App. at 14b).

8. In reaching its holding, the court of appeals applied the principle in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), that expressions of opinion are absolutely protected by the first amendment to the United States Constitution. (Pet. App. at 8b). The court analyzed the statements at issue according to the factors that it had employed in *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986), and in *Deupree v. Iliff*, 860 F.2d 300 (8th Cir. 1988), and that the District of Columbia Circuit had used in *Ollman v. Evans*, 750 F.2d 870 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

9. The court of appeals rejected petitioner Secrist's claim that the statements concerning "successful fundraising" and "opening doors to defense money coffers" constituted accusations that Secrist had directly asked people for campaign contributions in violation of the Hatch Act (Pet. App. at 12b):

> the challenged statements concerning fundraising are not so precise, specific, or verifiable that they can be equated—as Secrist alleges—as akin to an accusation of criminal conduct. *Cf. Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-85 (1974) (epithet "traitor" was opinion, not imputation of actual criminal conduct in context of labor dispute); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) ("blackmail" charge represented opin-

ion of developer's tactics, not accusation of crime). *See also Deupree*, 860 F.2d at 303.

(Pet. App. at 13b).[5] Quoting undisputed record testimony the court found that there are numerous ways Mr. Secrist may have raised money for the incumbent Senator Jepsen:

> One of the ways is to go out and actually solicit contributions, ask people for money.
>
> Another way is simply through what can be referred to as goodwill fund raising, or fund raising that occurs because an employee or someone who is working on your behalf goes out and does a job for someone that results in a campaign contribution.
>
> By his very presence on Senator Jepsen's staff, Jim Secrist sent a signal to the defense community, by the fact that the Secretary of the Navy was willing to do something very unusual, something that the Pentagon said was extremely unusual, that being detail a Marine Lieutenant Colonel to the personal staff of a United States Senator to supplement that staff, to act as a liaison between the Senator's office, defense contract[ors], and businesses in Iowa.
>
> That sends a signal that this particular Senator is a friend and is someone to support.
>
> And to the extent that any of that message resulted in campaign contributions from defense contractors, then Mr. Secrist raised money.
>
> To the extent that any small business person in the state of Iowa that Colonel Secrist worked with and helped out was pleased enough to support Senator Jepsen's campaign for a campaign contribution or to support the campaign in another way that led

[5] This false allegation concerning the meaning of the press release is the keystone of petitioner Secrist's entire actual malice argument. (Pet. at 10, ¶ 1). Because, as the court of appeals demonstrated, this allegation is incorrect, Col. Secrist's actual malice argument collapses. (Pet. at 10-12).

> to a campaign contribution, Colonel Secrist raised money.
>
> To the extent that Colonel Secrist was traveling in Iowa, meeting with small business people, acting as the Senator's emissary, if you will, assisting small businesses and enhancing Senator Jepsen's reputation with these small business people, and that resulted in campaign contributions, then Colonel Secrist was raising money.

(Pet. App. at 12b-13b). The court noted that Col. Secrist admitted being "very active on behalf of Iowa for almost two years" and assisting "hundreds of Iowa business firms in their efforts to sell to the government." (Pet. App. at 13b). The court also had pointed out that Senator Jepsen had been forced to concede publicly that his campaign funds had paid for Col. Secrist's trips to Iowa. (Pet. App. at 5b).

10. The court's holding also analyzed the public context in which the press release was issued, (Pet. App. at 8b-10b), which was a political campaign, (Pet. App. at 10b), and the literary context of the press release, (Pet. App. at 10b):

> Context is crucial and can turn what, out of context, appears to be a statement of fact into "rhetorical hyperbole," which is not actionable. *Ollman*, 750 F.2d at 1000 (J. Bork, concurring). *See Deupree*, 860 F.2d at 303; *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980).

(Pet. App. 8b).[6]

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[6] The first page of the press release that was reviewed by the court of appeals clearly proclaimed that the press release was issued and paid for by petitioner Harkin's campaign. (Respondents' Appendix).

The court also concluded the language of the release "signals that readers should expect Harkin's opinion." (Pet. App. 11b).

11. In dictum (Pet. App. at 14b-17b), the court of appeals also determined Col. Secrist had not produced clear and convincing evidence that respondents had—

> "in fact entertained serious doubts as to the truth of [their] publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), which amounted to a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See Liberty Lob y, Inc. v. Dow Jones & Co.*, 838 F.2d at 1292-93; *Speer*, 828 F.2d at 478.

(Pet. App. at 15b). In contrast to examples of bad faith, which could indicate reckless disregard, in *St. Amant*, 390 U.S. at 732-33, and, more recently in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989), the opinions in the press release were based upon—

> public reports filed by Jepsen's campaign committee and issued by the Department of Defense as well as the observation of a staff member whose credibility has not been questioned.

(Pet. App. at 17b). In fact, there was nothing in the record "suggesting with convincing clarity that . . . [respondents] acted in bad faith." (*Id.*).

Based upon its analysis of "all of the circumstances surrounding publication of the release," the court of appeals concluded that the challenged statements would be interpreted by reasonable readers of the press release "as Harkin's opinion on the effect of Secrist's appointment to Jepsen's staff." (*Id.* at 14b). Accordingly, holding that the statements are absolutely protected by the first amendment, the court of appeals affirmed the district court's grant of summary judgment to respondents. (*Id.*).

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The decision below applies first amendment principles that are not challenged by petitioner Secrist, who only challenges the application by the court of appeals of legal standards, which standards petitioner himself employs in his petition, to facts unique to this case and unlikely to be repeated in future cases. The decision of the court of appeals affirming the district court's summary judgment is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

I. Holding of the Court of Appeals

a. Petitioner does not challenge the law or the facts upon which the court of appeals based its holding that the disputed statements are constitutionally protected opinion. Instead, he simply invites this Court to enter into "[a]n examination of the facts" to establish the claimed error of the court of appeals. (Pet. at 16). The analysis of these unusual facts under a well-articulated and unchallenged legal standard does not present any ground for review by this Court. Toward the end of the petition, petitioner does suggest that the court of appeals applied a different legal standard because a political campaign was involved. (Pet. at 20). His guarded assertion is completely unfounded.

Contrary to petitioner's assertion, the court of appeals' decision constitutes a careful, painstaking analysis consistent with the standard previously employed in the Eighth Circuit and other courts in libel actions in a variety of factual settings. Indeed, in attacking the court of appeals' decision, petitioner employs in his own analysis of the facts the same four-part test applied by the court of appeals. (Pet. at 16-17). Petitioner's allegation that a different standard was used is incorrect.

b. Moreover, the court of appeals was clearly correct in holding that the statements complained of were constitutionally protected opinion. The court based its holding upon an aggregate of factors, (Pet. App. at 14b), not just one factor as petitioner suggests. The court's including the political context as one part of the overall analysis is entirely consistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The court of appeals correctly found that, from the writing style of the release, (Pet. App. at 11b), the heated political context and political nature of the publication, (Pet. App. at 8b-10b), and the extensively analyzed imprecision and unverifiability of the language used, (Pet. App. at 11b-14b),[7] it was clear the press release conveyed the opinions of its writers and would be so understood by its audience. (Pet. App. at 14b).

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[7] One aspect of this finding deserves emphasis. It was the gist of Col. Secrist's complaint that the press release should be interpreted to have asserted unambiguously that Secrist personally solicited campaign contributions for Senator Jepsen. (*e.g.*, Pet-App. at 12b.) The court of appeals refused to accept this argument, holding that the language used in the press release—that Secrist was "raising money" and "opening doors to defense campaign money offers" for Senator Jepsen—did not necessarily mean that Secrist personally solicited funds. The court held that these phrases could just as easily have referred to just what appears to have happened—that Secrist's actions (paid for partly by Jepsen's campaign and partly by the Marine Corps) generated "good will" in the defense community that resulted in increased contributions. (Pet. App. at 12b-13b).

The inescapable conclusion from this reasoning is that even if these statements are to be taken as fact and not opinion, Secrist also failed to prove that they were false. This failure of proof provides an independent ground for refusing to disturb the judgment of the court of appeals.

II. Dictum of the Court of Appeals

The main thrust of petitioner's complaint—that the court of appeals misapplied the actual malice standard—addresses what is merely dictum in the court of appeals' opinion and thus provides no reason for review by this Court. Moreover, even if, as petitioner has requested, this Court reviewed the court of appeals' application of established law to the facts of this case, there would be no reason to disagree with the court of appeals' dictum: petitioner's analysis is simply incorrect.

a. The court of appeals affirmed the district court by holding the challenged statements were constitutionally protected opinion. (Pet. App. at 14b). The court of appeals stated that its discussion of the actual malice issue was not necessary to its holding. (Pet. App. at 14b). This discussion, therefore, is dictum. In fact, to reach its discussion of actual malice, the court of appeals also stated that it assumed arguendo that Col. Secrist's interpretation of the press release was accurate—that the press release unambiguously accused him of directly asking people for money in violation of the Hatch Act (Pet. App. at 12b, 13b)—when in fact the court had just rejected Col. Secrist's allegation explicitly. (Pet. App. at 13b-14b).[8]

b. In any event, the court of appeals correctly concluded that Col. Secrist had not met his burden of producing clear and convincing evidence of actual malice. (Pet. App. at 14b). As the court recognized, and as respondent Harkin stated in the press release, Col. Secrist was "raising money" for the incumbent Senator Jepsen in "numerous ways." (Pet. App. at 12b-13b). Because the statements in dispute were not known by the respondents to be false,[9] and because there was no showing

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[8] *See supra* note 7.

[9] As we have just shown, *see supra* note 7, the court's discussions have also inescapably demonstrated that Secrist failed to prove that the disputed statements were in fact false.

of reckless disregard of the truth, there could be no actual malice. (Pet. App. at 14b).

Moreover, the court of appeals correctly relied upon this Court's decision in *St. Amant*, 390 U.S. at 733, that the failure to investigate facts obtained from reliable sources does not constitute actual malice. Here, the court of appeals found that the opinions expressed in the press release were based upon reliable, undisputed evidence obtained from public reports of Jepsen's campaign committee and of the Department of Defense and upon a witness "whose credibility has not been questioned." [10] (Pet. App. at 17b). By urging a finding of actual malice on such facts, petitioner seeks to overturn this Court's decision in *St. Amant*.

Finally, petitioner urges an incorrect application to this case of this Court's recent decision in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989). In *Connaughton*, the Court found clear and convincing evidence of actual malice: the defendant publisher's failure to investigate the story of an *unreliable* informant evidenced bad faith. 109 S.Ct. at 2693-94, 2697, 2698.[11] Thus, the *Connaughton* decision is consistent with the Court's previous decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and the example in *St. Amant* of bad faith reliance on an unreliable source. *St. Amant*, 390 U.S. at 732. Because the sources of information in this case were indisputably reliable, the *Connaughton* analysis does not apply here. (Pet. App. at 15b, 17b).

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[10] Petitioner's argument—that the conclusions inferred by respondents from these facts are unreasonable—(Pet. at 8-9), is unsubstantiated and completely irrelevant to an actual malice analysis.

[11] Petitioner here inexplicably claims that respondents should have gone so far as to request a governmental investigation of his activities. (Pet. at 12, ¶ 15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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FOR IMMEDIATE RELEASE
Oct. 11, 1984

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THE JEPSEN COLONEL CAPER

DES MOINES—A pentagon Marine Colonel assigned to drum up defense contracts for Iowa businesses has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.

Lt. Col. James E. Secrist was the subject of controversy last year when the Pentagon paid his $45,000 annual salary while assigning him to work as a member of Sen. Jepsen's personal Washington staff.

According to the Navy and Sen. Jepsen's office, Secrist was assigned to Jepsen to assist business in Iowa with the Pentagon's procurement process and obtain more defense contracts for the state.

During the time Secrist has been on the Jepsen staff, however, the percentage of national defense contract dollars awarded to Iowa businesses has not increased.

In the first half of FY 1984, Iowa has only received $132 million from defense contracts, approximately one-third of the total received in 1983. (Source: Department of Defense Office of Information.)

Since its formation, the Jepsen '84 Committee has received more than $88,000 from defense contractors' contributions, including Lockheed, Boeing TRW and LTV; about 60 percent of that amount was received after Secrist joined the Jepsen staff.

Secrist's assignment to the Jepsen office staff was approved in May of 1983 after the Senator personally sought and received permission from the Secretary of the Navy.

As chairman of the Armed Services Subcommittee on Manpower and Personnel, Jepsen oversees the process which sets employee ceilings for each military branch and has jurisdiction over military pay and benefits.

Paid for by Citizens for Harkin

Supreme Court, U.S.
FILED
OCT 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-220

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

JAMES E. SECRIST,

Petitioner,

v.

UNITED STATES SENATOR TOM HARKIN, PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN

Respondents.

REPLY BRIEF OF PETITIONER TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 89-220

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

JAMES E. SECRIST,

Petitioner

v.

UNITED STATES SENATOR TOM HARKIN, PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN

Respondents

Reply Brief of Petitioner to Brief for the Respondents in Opposition to

Petition for Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit

I. THE NEWS RELEASE OF CANDIDATE HARKIN, WHEN VIEWED IN ITS *ENTIRETY*, CONCLUSIVELY DEMONSTRATES THAT THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, IN AFFIRMANCE OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS, FAILED TO PERFORM A *COMPLETE DE NOVO* REVIEW OF THE *ENTIRE* RECORD BEFORE IT, AS REQUIRED BY OVER 25 YEARS OF PRECEDENT FROM THIS COURT ON THE ISSUES OR ACTUAL MALICE AND OPINION.

This reply is required for *three* principal reasons:

(1) The Eighth Circuit's opinion not only failed to exhaustively and meticulously review each and every statement of the news release complained of in the instant petition, but also failed to include the *entire* news release as published by Candidate Harkin on October 11, 1984. *Secrist*

v. Harkin, 874 F.2d 1244, 1253-54 (8th Cir. 1989); *see also* Pet. App. at 19b-21b; *compare* Reply at 1a-5a (Rec. at 28-31).

(2) The Respondents in their opposition have further attempted to undermine the significance of the *entire* news release by presenting to this Court an even more diluted version of the *entire* news release. *Brief For Respondents In Opposition* (hereinafter "Respond. Opp.") at Appendix (hereinafter "App.") 1a-1b.

(3) The Petitioner was informed by the Clerk of the United States Court of Appeals for the Eighth Circuit that Petitioner's timely request to have the record below certified and transmitted to this Court (*particularly*, Rec. at 28-31, the *entire* news release) would be held in abeyance pending a specific request by this Court.

Accordingly, peititioner submits the *entire* press release of Candidate Harkin as tendered by the respondents; and, as such, it was not thoroughly reviewed or even discussed by the Court below. (*See* Appendix to this Reply at 1a-5a). The purpose of this press release, when viewed in its entirety, was to provide supporting documentation, obviously gathered over several months preceding, to prove, from a *factual* standpoint, that the petitioner was engaged in criminal activity on behalf of the opposing candidate.

It should be noted, in reply, that respondents at page 12 of their opposition are fein to suggest to this Court that a *de novo* review of the entire record by the court of appeals below, or for that matter this Court, is merely a simple invitation by the petitioner. To the contrary, petitioner stands behind over 25 years of precedent from this Court in "public figure" cases on the issues of *actual malice* and *opinion*, from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) through *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ____, 105 L. Ed. 2d 562, 109 S.Ct. 2678 (1989).

Finally, what appears obvious to the petitioner and, hopefully, to this Court with a copy the *entire* news release of

Candidate Harkin now before it for the *first* time, neither did the court of appeals nor the district court below, in their collective findings that a *part* of the *entire* news release was protected opinion, conduct a meticulous, exhaustive analysis of this *publication* as would be indicated by the 25-year precedent from this Court. *Ollman v. Evans*, 242 U.S. App. D.C.-301, 750 F.2d 970 (1984), *cert. denied*, 471 U.S. 1127-30 (1985); *see also, Jones v. Palmer Communications, Inc.*, ____Iowa____, 440 N.W. 2d 884 (1989).

CONCLUSION

It is submitted that the brief in opposition to this petition is unresponsive to the issues presented and, further, that the decision of the court of appeals below has, under the precedent from this Court, failed in its fundamental duty to examine the publication, Candidate Harkin's news release, as a whole before affirming a summary judgment in favor of the respondents or declaring the *entire* news release to be opinion.

Procedurally, *ceteris paribus*, the posture of this case for decision under this Court's recent decision in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. ____, 105 L.Ed. 2d 562, 109 S.Ct. 2678 (1989) bears a striking resemblance to this Court's recent summary disposition of a petition for certiorari to the Supreme Court of Pennsylvania on October 10, 1989, in *Easton Publishing Company* v. *Alfred R. Boettger*, Supreme Court of the United States Docket No. 89-265, wherein this Court granted the petition for certiorari, vacated the judgment and remanded the case to the Supreme Court of Pennsylvania, Eastern District for further consideration under *Florida Star* v. *B.J.F.*, 491 U.S. ____, 105 L. Ed. 2d 443, 109 S.Ct. 2603 (1989).

Although counsel of record herein did request that the Clerk of the United States Court of Appeals for the Eighth Circuit certify and transmit the record in this case to this

Court, he was informed by said clerk that this would not be done unless this Court so requested. In any event, unless the record, albeit referenced by the petition, presents issues left unresolved by this Court in *Connaughton*, the relief afforded *Easton Publishing Company, supra*, may well fit the circumstances of this case.

Accordingly, it is respectfully requested that this Court grant instant petition for a writ of certiorari, vacate the judgment of the United States Court of Appeals for the Eighth Circuit and remand it to that court for further consideration in light of *Connaughton*.

Respectfully submitted,

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APPENDIX A

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FOR IMMEDIATE RELEASE
Oct. 11, 1984

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THE JEPSEN COLONEL CAPER

DES MOINES—A pentagon Marine Colonel assigned to drum up defense contracts for Iowa has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.

Lt. Col. James E. Secrist was the subject of controversy last year when the Pentagon paid his $45,000 annual salary while assigning him to work as a member of Sen. Jepsen's personal Washington staff.

According to the Navy and Sen. Jepsen's office, Secrist was assigned to Jepsen to assist businesses in Iowa with the Pentagon's procurement process and obtain more defense contracts for the state.

During the time Secrist has been on the Jepsen staff, however, the percentage of national defense contract dollars awarded to Iowa businesses has not increased.

In the first half of FY 1984, Iowa has only received $132 million from defense contracts, approximately one-third of the total received in 1983. (Source: Department of Defense Office of Information).

Since its formation, the Jepsen '84 Committee has received more than $88,000 from defense contractors' contributions, including Lockheed, Boeing TRW and LTV; about 60 percent of that amount was received after Secrist joined the Jepsen staff.

Secrist's assignment to the Jepsen office staff was approved in May of 1983 after the Senator personally sought and received permission from the Secretary of the Navy.

As chairman of the Armed Services Subcommittee on Manpower and Personnel, Jepsen oversees the process which sets employee ceilings for each military branch and has jurisdiction over military pay and benefits.

— MORE —

* A continuation of the first page of the entire news release (Rec. at 28).

DEFENSE CONTRACT CONTRIBUTIONS TO THE JEPSEN '84 COMMITTEE

Bendix PAC	$ 250
Eaton Public Policy	$ 3,000
Fairchild Industries	$ 1,750
General Dynamics	$ 6,950
Grumman Corp.	$ 3,000
Harris Corp.	$ 4,750
Hughes Aircraft	$ 3,900
Hughes Helicopter	$ 750
Litton Industries	$ 7,900
Lockheed	$ 4,283
LTV Corp.	$ 2,650
MartinMarietta Corp.	$ 2,500
McDonnell Douglas Corp.	$ 2,500
Boeing	$ 3,500
Northrup Employees	$ 3,366
Raytheon Co.	$ 5,450
Rockwell Int.	$10,625
Signal	$ 1,000
Texton	$ 2,000
TRW	$ 2,250
United Telecommunications	$ 1,100
United Technologies	$ 1,500
Vaught Co. Active Citizenship	$ 2,000
Planning Research	$ 2,000
Beech Aircraft	$ 1,000
Colt	$ 500
Donaldson	$ 100
FMC	$ 4,950
Gould	$ 1,750
Motorola	$ 1,100
Westgear	$ 500
	$88,874

* The second page of the entire news release (Rec. at 29).

SCHEDULE B ITEMIZED DISBURSEMENTS

Use separate schedule(s) for each category of the Detailed Summary Page

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FOR LINE NUMBER 17

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NAME OF COMMITTEE (in Full)

Jepsen '84 Committee

	A. Full Name, Mailing Address and ZIP Code	Purpose of Disbursement / Disbursement for	Date (month, day, year)	Amount of Each Disbursement This Period
	Iowa Power and Light Co. P.O. Box 657 Des Moines, Iowa 50303	Utilities Disbursement for: ☒ Primary ☐ General ☐ Other (specify):	05-04-84	$376.50
	B. Full Name, Mailing Address and ZIP Code Dee Jepsen 301 North Beauregard Street, #815 Alexandria, Virginia 22312	**Purpose of Disbursement** Dinner Expenses Travel Expense Reimb. **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 45.20 777.00
**	**C. Full Name, Mailing Address and ZIP Code** Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Reimbursement of Travel Expenses - Jim Secrist **Disbursement for:** ☒ Primary ☐ General ☐ Other (specify):	**Date (month, day, year)** 05-30-84	**Amount of Each Disbursement This Period** 569.51
	D. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Campaign Lodging Reimb. Roger W. Jepsen **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 144.54
**	**E. Full Name, Mailing Address and ZIP Code** Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Reimbursement of Travel Expenses - Jim Secrist **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 471.77
	F. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** U.S. Senate Post Office Postage Expense **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 368.97
	G. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Reimbursement of Travel Expenses - Senator Jepsen **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 77.00
	H. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Taping Dubbing expenses KCAU **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 25.00
	I. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Tape Expense from Iowa Public Brd. Network **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 16.13

SUBTOTAL of Disbursements This Page (optional)	2,871.62
TOTAL This period (last page this line number only)	

*The third page of the entire news release (Rec. at 30); this page is a true copy of the public record on file with the Federal Election Commission.

**The entries were circled in pen on this page of the entire news release.

4a*

[Illegible] . . . approved Secrist's assignment to Jepsen's office in response to a May 24, 1983 letter from Jepsen to Navy Secretary John F. Lehman Jr. In the letter, Jepsen asked Lehman to "take action to assign Lieutenant Colonel Secrist to my personal staff through the remainder of the 98th Congress." Secrist became a member of the Jepsen Staff on July 1, 1983.

Congressional Quarterly also reported, "Defense Department rules (Directive 1000.17) governing the assignment of employees to non-department offices point out that such assignments are 'generally not favored and shall be rigorously controlled' and will be made 'only in furtherance of specifically identifiable interests of the Defense Department.' Neither Defense Department nor Navy spokesmen could name the 'specifically identifiable interests' furthered by Secrist's assignment." (CQ page 1660 Aug. 13, 1983).

In an August 20, 1983 letter to the Des Moines Register, Jepsen wrote, "Also, you will look in vain for Lt. Col. Secrist at any election-year hearings or public event in Iowa next year. His responsibilities lie in service to Iowa not in 'opening my car door.'"

According to Harkin, Lt. Col. Secrist's involvement is clear. In the May 17-June 30, 1984 Federal Election Commission Report, Secrist's name appeared twice for reimbursement of more than $1,000 for travel expenses during that period. The reimbursements were made from Jepsen's office account. That office account has also come under fire this year for failure to report funds to the Federal Election Commission and the Internal Revenue Service.

"While the Lt. Col. may not be opening the Senator's car doors," Harkin said. "It appears that he is successful at opening doors to defense campaign money coffers on behalf of the Senator."

— END —

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* The fourth and last page of the entire news release (Rec. at 31).